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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 262

UNITED STATES OF AMERICA, PETITIONER

v.

GARBUTT OIL COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum of conclusions by the District Court (R. 51–52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 F. (2d) 749.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1937. (R. 89–90.) The petition for a writ of certiorari was filed July 28, 1937, and was granted October 11, 1937 and the case was assigned for hearing immediately following No. 48, *United States* v. *Mable S. Andrews, Executrix of*

the Estate of Matthew Andrews, Deceased (R. 91). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a timely refund claim on a specific ground may be amended, after the period of limitation has expired, by a second claim on a different and unrelated specific ground.

2. Whether the Commissioner waived, or had the power to waive, the statutory requirement for a timely refund claim.

STATUTES AND TREASURY REGULATIONS INVOLVED

The statutes and treasury regulations involved will be found in the Appendix, *infra*, p. 27.

STATEMENT

This is an action brought by the respondent in the District Court of the United States for the Southern District of California, Central Division, to recover an alleged overpayment of income taxes for 1919, tried without a jury (R. 46). The facts, as stipulated (R. 47–50) and as found by the trial court (R. 53–67), may be summarized as follows:

The respondent, a California corporation, acquired a lease of certain oil property on October 3, 1907 (R. 49, 66). On April 10, 1911, its board of directors adopted a resolution to the effect that all oil produced after January 1, 1911, should be assigned to the respondent's lessors to the extent of

their royalty interest, and to the respondent's stockholders to the extent of their holdings of stock, pro rata, in kind, so long as the stockholders should pay calls for money necessary to cover the expenses of the respondent. Thereafter, the resolution remained in effect at all times to and including the year 1919, and all oil produced was distributed in kind to the lessors and the stockholders. (R. 49, 66–67.)

On its books and income tax returns the respondent adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income. (R. 49.)

For 1919, the respondent filed an income and excess profits tax return disclosing a net income of $16,928.61, and a tax liability of $2,072.68, which was paid during 1920 (R. 53, 55). Upon audit of the return the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 for 1919, which the respondent paid on April 3, 1925 (R. 54).

On March 30, 1929, the respondent filed a claim for refund of the entire sum of $3,105.65 which had been paid within the four year period of limitations for filing claims based upon two specific grounds: (1) that it was entitled to an additional deduction of $12,500.00 for the amortization of the cost of a drilling contract of the respondent with Union Oil

Company of California in which the latter agreed to provide expenses of developing the leased oil property and to be reimbursed only out of any oil produced as consideration for capital stock of the respondent of the par value of $250,000.00 and (2) that, for the purposes of the excess profits tax, its invested capital had been understated by the failure to include the unrecovered cost of that drilling contract in the sum of $109,375.00 (R. 54–62, 63).

While this refund claim was pending before the Commissioner, but after expiration of the four year period of limitation on April 3, 1929, the respondent, on May 31, 1929, filed a "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919" (R. 62). In that statement, hereinafter sometimes called the second refund claim, respondent asserted that it "now develops that a further reason exists in support of" the pending claim, because by the distribution of oil in kind the respondent realized no taxable income during 1919, and that "it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full" for the reasons set forth in the statement. The statement seeks the refund of the entire tax paid for 1919 in the sum of $5,178.33 or so much thereof as is refundable within the statute of limitations. (R. 62–65.)

A letter dated August 12, 1929, from the Commissioner to the respondent (R. 37–38) stated that its claim for refund of $3,105.65 would be rejected on the ground that inasmuch as the Union Oil Company was to be reimbursed out of oil receipts a double deduction for development cost could not be allowed by also amortizing the amount of $250,000.00 as cost of the contract. The letter then referred to the contention in the statement filed on May 31, 1929, and stated: "This office holds that the distribution of the oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation." (R. 38, 66). This letter then stated that a hearing could be had on the proposed rejection of the claim if requested in writing.

On October 4, 1929, a conference was held on the claim (R. 39). It does not appear whether or not the merits of the late claim were discussed.

On November 13, 1929, the Commissioner sent another letter to the respondent (R. 39–41), stating that the claim for refund of $3,105.65 would be rejected because the drilling contract was a liability rather than an asset and stating that the new contention was rejected on the ground that it was not referred to in the timely claim and was filed not only after the expiration of the period of limitation on April 3, 1929, but also after expiration of the time to perfect informal claims, after expiration of the period of limitations, by filing a formal claim on or before May 1, 1929, pursuant to Treasury De-

cision 4266, Cum. Bull. VIII–1, p. 111. Formal rejection of the claim for $3,105.65 followed on November 21, 1929 (R. 42, 48–49).

The respondent sued in the District Court for the Southern District of California for the recovery of $3,105.65, upon the grounds stated in its claim of March 30, 1929, and upon the ground asserted in the statement filed of May 31, 1929 (R. 12–15). At the trial the grounds of the refund claim filed March 30, 1929 were abandoned and recovery was sought upon the ground set forth in the statement filed on May 31, 1929 (R. 65, 88). The trial court held that the statement filed May 31, 1929 did not constitute an amendment of the claim filed March 30, 1929 and was filed too late (R. 51–52, 67–68). The trial court found that the Commissioner, to the extent indicated in his letter of August 12, 1929, considered the late contention on the merits (R. 66). Judgment was entered in favor of the United States (R. 69–70).

The Circuit Court of Appeals, reversing the District Court, held that the statement filed May 31, 1929 was an amendment germane to the refund claim filed March 30, 1929 and that both claims grew out of substantially the same facts (R. 88).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts of this case, the respondent was entitled to recover on the new claim, filed after the period of limitation had ex-

pired, but purporting to be an amendment to the timely claim for refund.

2. In failing to hold that, under the facts of this case, refund on the new claim, filed after expiration of the period of limitation, was barred by the statute of limitations, and that the claim so filed did not constitute an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In holding that the purported amendment was germane to the original claim for refund.

4. In failing to affirm the judgment rendered by the District Court in favor of the United States.

SUMMARY OF ARGUMENT

The timely claim for refund assumed the existance of realized income and sought recovery solely on the two specific and definite grounds that $12,500.00 should be deducted from gross income as amortization of the cost of the contract with Union Oil Company and that $109,375.00 should be added to invested capital as the unreturned cost of that contract. The untimely statement "for the Purpose of Perfecting and Completing" the timely claim asserted a "further reason" for refund which presented the wholly different and unrelated ground for refund that there was no realized income and which was then barred by the statute of limitations as construed by the applicable decisions and treasury regulations.

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The Commissioner, by considering and discussing the merits of the late claim, after the period of limitation had expired, to the extent stated in the letter of August 12, 1929, to the respondent did not in fact waive, and had no power to waive, the statutory requirement of a timely refund claim.

ARGUMENT

I

THE SECOND REFUND CLAIM WAS A WHOLLY NEW CLAIM AND WAS BARRED BY THE STATUTE OF LIMITATIONS

The Revenue Act of 1926, Sec. 284 (b) (1) (Appendix, *infra,* p. 27), provides that no refund of an overpayment of any income tax imposed by any prior Revenue Act shall be made unless a claim is filed within four years of payment of the tax. The additional assessment of $3,105.65 for 1919, imposed under the Revenue Act of 1918, was paid on April 3, 1925. Within four years, and on March 30, 1929, the timely refund claim, relying solely on the two specific grounds relating to the cost of the drilling contract with Union Oil Company, was filed. After expiration of the four year period, and on May 31, 1929, the statement "for the Purpose of Perfecting and Completing" the timely claim, and relying on the wholly different specific ground relating to distribution of the respondent's oil in kind to lessors and stockholders, was filed

and was disallowed by the Commissioner solely because it was too late (R. 41).

Reversing the District Court, the Circuit Court of Appeals held that the late statement of a new and different ground was an amendment germane to the timely claim and growing out of substantially the same facts and for this determination relied upon *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.

The Government contends that this case is governed by the rule announced in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, June 1, 1937, petition for rehearing now pending; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with an opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631; *Swedish Iron & Steel Corporation* v. *Edwards*, 1 F. Supp. 335 (S. D. N. Y.), affirmed *per curiam* on the authority of the *Prentiss* case, 69 F. (2d) 1018 (C. C. A. 2d).

In *United States* v. *Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, Deceased*, No. 48, October Term 1937, to be argued immediately before this case, the petitioner contends in its brief, as it contends here, that a second refund claim, filed after expiration of the period of limitation and relying on a ground different from the specific ground set forth in a timely claim, is not

an amendment of the first claim and is barred by the statute of limitations as construed by the cases cited above and by the applicable treasury regulations. The petitioner respectfully refers this Court to its brief in the *Andrews* case.

In the present case the timely refund claim did not charge overpayment of taxes generally, but asked for the refund of $3,105.65 upon the two specific grounds: (1) a deduction of $12,500.00 for the amortization of the cost of the drilling contract with the Union Oil Company, and (2) a redetermination of invested capital to include the unrecovered cost of the drilling contract. This claim did not leave the grounds in doubt, so that it might be said that the Commissioner had only himself to blame for not promptly rejecting it for insufficiency of form and insisting, at the outset, within the period of limitation, upon a specific claim. The claim was specific and the Commissioner was under a duty to consider the two limited questions it presented.

The untimely second claim, the "Statement * * * for the Purpose of Perfecting and Completing" the timely claim, presented for the first time the entirely new contention that the respondent realized no taxable income upon distributing, in kind, the oil it produced, and sought to recover the entire tax for 1919 in the sum of $5,178.33, or so much thereof as was refundable under the statute of limitations (R. 62–65).

The theories of recovery asserted in the two claims were wholly different. The first claim admitted, and did not require the Commissioner to consider, the existence of gross income, and limited itself entirely to the question of a proper deduction and a determination of invested capital. The second claim sought an entirely different inquiry by claiming that no income was realized. The investigation required to determine the merits of the first claim would not lead the Commissioner to consider the ground asserted in the late claim.

The decisions of this Court permitting amendments to timely refund claims after the period of limitation has expired are distinguishable because they involve cases in which timely *general* refund claims have been amplified and amended by late specific claims in situations where (1) a similar amendment to a complaint would be allowed and (2) under the usual administrative practice the Commissioner, in considering the timely general claim, would be required to ascertain the facts and grounds later formally set forth in the late amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

In *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, 32, there was "no change of importance, unless importance be attached to the form of the relief demanded." Under the administrative practice in that case the Commissioner, in order to

dispose of the timely claims, was required to investigate the basis of the late amendment.

Application of the two tests approved by this Court, amendment of pleadings and the administrative practice, discloses that the second claim in the present case was not an amendment of the first claim, but was a wholly new claim.

1. Under the most liberal rule of amendment of pleadings (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68) a complaint stating a cause of action against the United States based on claimed deductions from gross income, and in this manner admitting or assuming existence of gross income, could not be changed after the statute of limitations had run into a cause of action based on the complete absence of income. Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422.

2. The realities of administrative practice support the determination that the late claim here was not an amendment of the timely claim. The first claim assumed the existence of income and claimed specific deductions and obviously would not suggest consideration whether there was realized income. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73.

These considerations indicate that the necessities and realities of administrative practice, involved where a refund claim on specific grounds of deductions from gross income is asserted, require the conclusion that such a claim may not be amended, after the period of limitation has expired, by a second claim on the wholly unrelated ground that

there was no income realized by the taxpayer. *United States* v. *Henry Prentiss & Co., supra; New York Trust Co.* v. *United States, supra; United States* v. *Richards, supra; Bryant Paper Co.* v. *Holden, supra.*

II

THE COMMISSIONER DID NOT WAIVE AND HAD NO POWER TO WAIVE THE STATUTORY REQUIREMENT FOR A TIMELY REFUND CLAIM

The court below held that the second claim was timely, as an amendment of the first claim, and therefore did not pass upon the question of waiver.

If this Court holds, as we contend in Point I, *supra,* that the second claim was not timely, as an amendment of the first claim, it will become necessary to determine whether the Commissioner waived, or had the power to waive, the objection based on the lateness of the second claim.

The respondent contended in the court below that the Commissioner waived this objection, citing *Tucker* v. *Alexander,* 275 U. S. 228; *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *Reynolds* v. *McMurray,* 77 F. (2d) 740 (C. C. A. 10th); *United States* v. *Humble Oil & Refining Co.,* 69 F. (2d) 214 (C. C. A. 5th); *United States Paper Exports Ass'n* v. *Bowers,* 6 F. Supp. 735 (S. D. N. Y.); *Weihman* v. *United States,* 4 F. Supp. 155 (E. D. Pa.).

A. *The Commissioner did not waive the untimeliness of the second claim*

The late second claim asserted the new ground that the respondent, by distributing in kind the oil it produced, realized no income. The claim of waiver is based entirely on one remark, after the period of limitation had expired, in the letter dated August 12, 1929 (R. 37–38) to the effect that distribution of oil in kind represented a distribution of profits taxable to the respondent (R. 38). The trial court found that to the extent of that statement the Commissioner had considered the late contention on the merits (R. 66). The trial court did not find that this remark was or was intended to be a waiver of the period of limitations.

The facts disclose that no waiver was intended or occurred. The purpose of the letter of August 12, 1929 was to advise the respondent that the timely claim would be rejected on the merits and to give the respondent a hearing or conference on the proposed rejection if it was requested in writing. The letter does not state whether or not the merits of the late contention could be considered at the conference.

The conference took place on October 4, 1929 (R. 39). It does not appear whether the merits of the late claim were considered at the conference. It does appear, however, in the letter of November 13, 1929, that when the Commissioner acted after the conference he rejected the second conten-

tion solely because it was late. The merits of the late contention are not mentioned in that letter.

A waiver is defined as an intentional relinquishment of a known right. *Cordova* v. *Hood,* 17 Wall. 1, 7; *Champion Spark Plug Co.* v. *Automobile Sundries Co.,* 273 Fed. 74, 79 (C. C. A. 2d). A taxpayer's statutory waiver of the limitation to assess and collect income taxes, consented to by the Commissioner, is not a contract. *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466. Such waivers are voluntary, unilateral acts. *Stange* v. *United States,* 282 U. S. 270, 276. In *Florsheim Bros. Co.* v. *United States, supra,* this Court denied the taxpayer's contention that the Commissioner's consent to waivers for one year after expiration of the period of limitations was an agreement that Congress would not by statute extend the period of limitations applicable to these waivers. This Court stated at page 466:

> And obviously, the Commissioner did not undertake to limit the power of Congress to extend the period of limitations, as consideration for the waivers.

The Commissioner did not intend to attempt to waive the statute in the present case.

The Commissioner did not expressly waive the objection that the second claim was late. The respondent must rely on an implied waiver, after the period of limitations had expired, based solely on the one reference to the merits of the late claim. The respondent did not rely on this reference to its

damage because the period of limitation had already expired. A different situation might be presented if the Commissioner had referred to the merits of the new contention before the expiration of the period of limitation and the respondent claimed that such a reference led him to believe that the contention would be determined on the merits without filing a formal claim. Although express waivers may require no reliance upon them in order to assert them, waivers should not be readily implied in the absence of acts calculated to induce the other party to rely upon them to his detriment. *Victor Products Corp.* v. *Yates-American Machinery Co.*, 54 F. (2d) 1062, 1064 (C. C. A. 4th); *G. Amsinck & Co.* v. *Springfield Grocery Co.*, 7 F. (2d) 855 (C. C. A. 8th); cf. *Globe Mutual Insurance Co.* v. *Wolff*, 95 U. S. 326, 333. Implied waivers should be recognized only where acts clearly indicating abandonment of the right and inconsistent with assertion of the right appear. *Champion Spark Plug Co.* v. *Automobile Sundries Co.*, 273 Fed. 74, 79 (C. C. A. 2d).

In the present case the trial court failed to find such a waiver. We submit that the facts are entirely insufficient in the present case to constitute an implied waiver.

B. *After the expiration of the period of limitations the Commissioner had no power to waive the statutory requirement for a timely refund claim*

The petitioner contends that even if the facts are sufficient to constitute an implied waiver, the

Commissioner, after the period of limitation had expired, had no power to waive the petitioner's objection that this suit cannot be maintained because the claim upon which it is based was not filed within the period required by the statute.

Section 284 (b) (1) of the Revenue Act of 1926 provides that no refund shall be allowed after four years from the time the tax for 1919 is paid unless a claim therefor is filed within that period. Revised Statutes, Sec. 3226, as amended (Sec. 1113 (a), Revenue Act of 1926) provides that no suit shall be maintained unless a claim is filed in accordance with the law and regulations. The claim for refund which the statute requires "obviously relates to the claim which may be asserted by the suit." *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, 272.

The treasury regulation in effect when the second claim was filed on May 31, 1929, added to the statutory requirement the requirements that the refund claim should be on a prescribed form and should set forth each ground in detail under oath and should set forth the facts, and that no refund would be allowed except upon a ground set forth in a claim, or an amendment, filed prior to the expiration of the period of limitations. Treasury Decision 4265, VIII–1, Cumulative Bulletin, p. 110, amending Treasury Regulations 74, Art. 1254, Revenue Act of 1928.

If the late claim is not an amendment of the timely claim, it was barred when it was filed on

May 31, 1929, not only by the regulation but also by the statute, apart from the regulation, because the statute requires that the claim sued upon must be presented in time. *United States* v. *Felt & Tarrant Co., supra.* The petitioner submits that the Commissioner had no power, after expiration of the period of limitations, to waive the statutory requirement, as distinguished from the requirements of the regulations, and thereby to create a cause of action against the United States.

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the distinction between the statute and the regulations is emphasized at page 71:

> The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. * * *

It is clear that Congress has not expressly or by implication conferred authority upon any Government officer to waive the statute of limitations in respect of suits against the United States. In the absence of statutory authority no Government officer has the power to waive the statute of limitations. *Finn* v. *United States,* 123 U. S. 227, 232; *Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1057 (C. C. A. 2d). This

rule is based upon the doctrine, often expressed in suits to recover internal revenue taxes, that a suit may not be brought against the United States unless it is clearly within the terms of the statute waiving sovereign immunity and granting consent to suit. *United States* v. *Michel,* 282 U. S. 656, 659; *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141, 143; *Cheatham* v. *United States,* 92 U. S. 85, 88–89; *Nichols* v. *United States,* 7 Wall. 122, 130. A refund claim which complies with the statute is a jurisdictional condition precedent to suit. *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141, 143; *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th).

The fact that Congress did not intend that the Commissioner should have any general power to waive the period of limitations is indicated by the statutory grant of a limited extension of the period of limitations upon condition that the taxpayer execute a waiver of the limitation on assessment. Section 284 (g) of the Revenue Act of 1926 provides that if the taxpayer, before June 15, 1925, has filed a waiver of his right to have the taxes for 1919, the year in question here, assessed within five years, the time to file a refund claim for those taxes is extended to April 1, 1926, or until four years after payment of the tax. This express provision in the same section of the statute as the general limitation on refund, Section 284 (b) (1), indicates that Congress did not intend that the Com-

missioner should have the power to waive the general period of limitations.[1]

Section 608 of the Revenue Act of 1928, in effect before the alleged waiver claimed here occurred, provides that any refund after its enactment is erroneous (a) if made after the expiration of the period of limitation for filing claim therefor unless within such period a claim is filed; or (b) if made after expiration of the period of limitation for filing suits, unless (1) within such period suit was begun, or (2) the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit pending final decision in some other pending case. Section 610 of the Revenue Act of 1928 provides that erroneous refunds may be recovered in actions by the United States within two years after the refund. These sections indicate clearly that the Commissioner has no power to waive the statute of limitations even by granting a refund. In the present case, even if the Commissioner had actually paid the refund and, to this extreme extent, attempted a waiver, the refund would be erroneous and could be recovered in an action by the United States.

These statutory provisions make it very clear that the Commissioner had no power to waive the

[1] Sec. 278 (c) of the Revenue Act of 1926 and Sec. 278 (f) (added by Sec. 506 (b) of the Revenue Act of 1928) also regulate taxpayers' express waivers.

statutory requirement for a refund claim. In *Daube* v. *United States,* 289 U. S. 367, this Court stated, at 372:

> High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended.

It has been stated, in cases like the present case in which the late claim is not an amendment of the timely claim, that the Commissioner has no power to waive the statutory requirement. *United States* v. *Richards,* 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden,* 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631.

In the *Bryant* case the court stated, at page 372:

> The Commissioner had no authority to extend the statute of limitations by allowing claims for overpayment which were not presented to him until they were barred by limitations.

In the *Richards* case the court stated, at page 801:

> It is no answer to say that the facts were already before the Commissioner by virtue of the deduction claimed in the original return and its disallowance. The required statutory method for bringing an assessment to the attention of the Commissioner is by

> a timely claim for refund, and without such claim there is nothing upon which the Comsioner may act.

It is true that despite the provision of Revised Statutes, Sec. 3226, as amended, to the effect that no suit may be maintained until a claim has been filed in accordance with the regulations, it has been held that the Commissioner, before the expiration of the period of limitations, may waive the requirement of the regulations that the supporting facts or reasons be stated in the claim. *Tucker* v. *Alexander,* 275 U. S. 228; cf. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 71.

In *Tucker* v. *Alexander, supra,* a timely refund claim and the complaint in the action to recover the tax alleged two specific grounds for refund, which were redetermination of the March 1, 1913, value of stock owned by the taxpayer and redetermination of the liquidation value of the stock in 1920. Upon the trial of the action, within the period of limitations, the taxpayer abandoned the two grounds alleged in its claim and in its complaint and asserted only the new ground that the Commissioner erred in deducting from the 1913 value of the stock, as a return of capital, the value of property distributed in May, 1913. Government counsel stated on the trial that the new question was the only one involved in the case and stipulated the amount to be recovered if the trial court held in favor of the taxpayer on the new ground. The trial court determined the new question on the merits in favor of

the Government. For the first time the lack of a sufficient refund claim was raised on appeal, and the Circuit Court of Appeals decided that the new claim could not be the basis of recovery because not asserted in the refund claim. 15 F. (2d) 356 (C. C. A. 8th). This Court held that there was an express waiver and that the Government's counsel had power, before expiration of the period of limitation, to waive the objection that the supporting facts or reasons were not stated in the claim. This Court stated, at page 231–232:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States,* 123 U. S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.

Tucker v. *Alexander,* does not hold that any requirement of the statute can be waived either before or after the expiration of the period of limitation. This is clarified by the fact that the Court in its opinion at page 231 mentioned the fact that the Solicitor General did not urge that the government's possible objection could not be waived. The objection involved is indicated by the Government's brief which stated at page 25 that the defect involved was in form and contents of the claim "prescribed not by the statute but by regulation" and that it seemed doubtful that public policy required that regulations could not be waived.

In the *Tucker* case, before the expiration of the period of limitations and on the trial of the action, the claim which was relied upon was presented to Government counsel who expressly waived the requirement of the regulations that the facts and reasons in support of the claim be set forth either in the claim then before the Commissioner or in another timely claim. That waiver relinquished no substantial right of the Government but only the procedural objection which if made would merely impose upon the Government and the taxpayer, as this Court stated at page 231 of its opinion, "the necessity of further legal proceedings" by requiring another timely refund claim and another timely suit.[2]

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[2] The record, No. 167, October Term, 1927, shows that the 1920 return was filed, and the tax disclosed thereby, was paid on March 16, 1921. The additional tax for 1920 was paid on

In the present case, however, the expiration of the period of limitations before presentation of the claim now sued upon gave the Government a complete defense to any suit on that claim and deprived all courts of any jurisdiction in any suit on that claim. The Commissioner had no power thereafter, by express or implied waiver, to relinquish the sovereign immunity from suit on that claim.

The other cases relied upon by the respondent in the court below, page 13, *supra,* are distinguishable also because in none of them did the court state that the requirement of the statute could be waived after expiration of the period of limitations.

It is submitted that in the present case waiver of the statutory requirement after expiration of the period of limitations is involved. The Commissioner had no power to waive that requirement.

CONCLUSION

This suit upon the ground asserted for the first time after the expiration of the period of limitation is barred because the late claim was not an amendment of the timely claim. The Commissioner, after expiration of the period of limitation, did not waive, and had no power to waive, the objection that the statute of limitations had run before the late claim was presented. Therefore,

---

October 20, 1923, the refund claim was filed on November 2, 1923, and the trial occurred on June 12 and 13, 1925, within the four year period of limitations.

the judgment of the court below should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted.

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NOVEMBER 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid

during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the period of limitation for filing claim therefor, unless within such period claim was filed, or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Treasury Decision 4265, VIII–1, Cumulative Bulletin 110 (amending Art. 1254 of Regulations 74, promulgated under the Revenue Act of 1928):

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an

amendment thereof filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 262

UNITED STATES OF AMERICA,

Petitioner,

vs.

GARBUTT OIL COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below.

The memorandum of conclusions handed down by the District Court [R. 51-52] is unreported. The opinion of the Circuit Court of Appeals [R. 85] is reported at 89 Fed. (2d) 749.

Jurisdiction.

The Judgment of the Circuit Court of Appeals was entered April 28, 1937 [R. 89]. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.